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No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

MELVIN E. LEVINSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST JUDICIAL DISTRICT, ILLINOIS

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1. United States Constitution Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. United States Constitution Amendment XIV, section 1 provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Illinois Constitution (1970) Art. 1 Sec. 11 provides:

> § 11. Limitation of Penalties After Conviction
>
> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

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MELVIN E. LEVINSON,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST JUDICIAL DISTRICT, ILLINOIS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioner, Melvin E. Levinson, respectfully prays that a Writ of Certiorari be issued to review the decision of the Appellate Court of Illinois for the First District, entered on August 13, 1979. A timely petition for rehearing was filed and was denied on September 24, 1979. A timely Petition for Leave to Appeal was filed in the

Supreme Court of Illinois and was denied on March 27, 1980. On April 8, 1980 the Supreme Court of Illinois stayed its mandate until a Petition for Writ of Certiorari is filed and determined by this court.

OPINION

A copy of the opinion of the Appellate Court of Illinois for the First District is published in 75 Ill. App. 3d 428, 394 N.E.2d 509. (Appendix I *infra*)

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., sec. 1257(3).

QUESTIONS PRESENTED

1. In a criminal contempt proceeding where the defendant was charged with an offense committed more than three years earlier, and the defendant pleaded the State's 3-year statute of limitations for non-capital criminal cases, which plea was disregarded by the State courts, and the defendant was sentenced to five years imprisonment, was the defendant denied "equal protection of the laws" as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States?

2. Was the defendant denied "due process of law", guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by the act of the State's Attorney's in presenting the matter to a Grand Jury, while the criminal contempt proceeding was pending against the defendant, and although the Grand Jury returned a "no bill", the State's Attorney introduced in the contempt proceeding, over the defendant's objection, the evidence which was obtained in the Grand Jury proceeding?

STATEMENT OF THE CASE

On March 21, 1973, the State's Attorney of Cook County, Illinois (hereinafter referred to as the People), filed a Petition for Rule to Show Cause why the Petitioner (hereinafter referred to as Defendant) and his co-respondent (hereinafter referred to as respondent) asking that the Rule issue against the defendant and respondent to adjudge them in contempt of Court. On March 7, 1973, defendant filed a Motion to Strike the Petition and on March 13, 1973, by leave of court, defendant filed an Amended Motion to Strike the Petition.

The aforesaid Motions to Strike were not heard. Instead, on June 28, 1973, the People filed an Amended Petition for Rule to Show Cause and a Rule to Show Cause was, by leave of court, issued and served upon defendant and respondent.

The Amended Rule to Show Cause charged that the defendant and respondent as administrator of the estate, and defendant his attorney did on

1. January 16, 1968;
2. June 26, 1968;
3. November 29, 1969; and
4. June 6, 1970,

file false accounts in utter disregard for the truth or falsity of the matters contained therein and thereby attempted to deceive and mislead the court.

In addition, the Rule to Show Cause (hereinafter referred to as the Rule) alleged that:

> "$136,252.96 is missing from the estate . . . which sums were . . . converted to the use of . . . [respondent and defendant], and that

"On January 6, 1970 there are no funds in the La-Salle National Bank Account and less than #.00 in the American National Bank . . . Account."

The Rule Prayed that:

"WHEREFORE, petitioners, PEOPLE OF THE STATE OF ILLINOIS, for the reasons hereinabove stated, pray that this Court enter an order or rule requiring I. Harvey Levinson and Melvin Levinson, respondents, to show cause, if any they can, why they should not be found to be in contempt of Court and punished according to law for their failure to comply with the orders of this Court and for conduct committed in open Court by representations and affidavit which tended to embarrass or obstruct the Court in the administration of justice, and which brought the administration of law in this Honorable Court in disrepute."

On June 7, 1973, before the filing of the Amended Petition for Rule to Show Cause by the People, defendant filed a Motion to Dismiss based upon the Statute of Limitation provided for in the Illinois Criminal Code. This motion was heard and denied.

On October 25, 1973, pursuant to court order, the People filed their Bill of Particulars stating that:

1. The accounting filed on January 16, 1968; June 26, 1968; were filed by the defendant and known to be false;
2. Defendant participated in the preparation of the account of January 6, 1970, but that the People had no knowledge of whether defendant had filed said account or caused said account to be filed, and
3. The estate's funds had been misappropriated between 4/25/66 and 8/1/69.

and that these acts constituted the contemptuous acts for which the People sought the imposition of punishment.

Three separate Motions to Disfniss said Rule as being barred by limitations were filed including the last one filed on May 17, 1975 wherein the defendant claimed his rights under the XIVth Amendment to the Constitution of the United States of America, and indeed, the very cases used in this Petition for certiorari were argued to the court. The Motions were denied.

On February 7, 1975 defendant filed a Motion to Quash and Suppress Evidence alleging inter alia that:

> ". . . Respondent, Melvin Levinson, . . . moves this Honorable Court to quash and suppress any and all evidence obtained by the Petitioner by reason of criminal Grand Jury hearings, and states as his reasons therefore as follows:
>
> 1. That the State's Attorney of Cook County, Illinois, has instituted Grand Jury proceedings relative to certain matters regarding the Estate of Leo Ziv, deceased, which are presently before this Court.
>
> 2. That during the course of said proceedings and by virtue of said Grand Jury proceedings, certain information, facts, statements and witnesses' names were obtained by the State's Attorney of Cook County.
>
> 3. That the Petition presently pending before this Court and the Answers to the Bill of particulars filed herein by the State's Attorney of Cook County, are in part based upon information obtained in secert Grand Jury testimony.
>
> 4. That said Grand Jury returned a No Bill against the respondent, Melvin Levinson."

The People answered admitting the allegations, but not the legal effect thereof and stated, inter alia:

> "1) No unlawful search and seizure has taken place.

2) The Motion is not in proper form, in that there are no facts indicating how an illegal search and seizure has taken place as required by Chapter 38, Section 114-12, Illinois Criminal Law and Procedure.

3) Chapter 28, Section 112-6, Illinois Criminal Law and Procedure, allows for disclosure of Grand Jury proceedings.

4) The charge against defendant resulted from an on-going criminal investigation that included the charge originally before the Grand Jury."

The State thereupon filed an unverified answer, alleging inter alia:

"3) Chapter 38, Secton 112-6, Illinois Criminal Law and Procedure, allows for disclosure of Grand Jury proceedings by the State's Attorney in the performance of his duties.

4) The charge against defendant resulted from an on-going criminal investigation that included the charge originally before the Grand Jury."

This Motion was based upon the XIVth Amendment and the Vth and IVth Amendment and although denied on May 17, 1975, defendant again claimed his rights under the IVth, Vth, VIth and XIVth Amendment to the United States Constitution which was also denied by the court.

Before the trial of said cause the defendant and respondents were severed and respondent was held to be incompetent to testify.

At the trial of the defendant the People proved that the accounts of January 16, 1968; June 26, 1968; November 29, 1969 and January 6, 1970 were inaccurate. The People proved that the last of the estate's money had been misappropriated by 1969. The proof also showed that the ac-

counts of January 16, 1968, and June 26, 1968 were never acted upon and that the account of November 21, 1969 was not only never acted upon but stricken at defendant's request. The evidence also showed that in 1969 defendant was replaced as attorney for the respondent and while the format of the January 6, 1970 accounts was similar to that of November 21, 1969 the defendant did not prepare or file that account which was also immediately stricken.

The proof also showed that: The defendant and respondent were called before a Grand Jury operating after the Rule to Show Cause was served and forced under penalty of contempt to give the Grand Jury handwriting exemplars and to appear before the Chicago Police Department for handwriting analysis; that the respondent's and defendant's personal records—not connected with the estate—were subpoenaed before the Grand Jury; that all documentary evidence produced at the trial was obtained through the Grand Jury process and so was all but two witnesses' testimony and that absent this documentary evidence, especially the personal records and handwriting of the defendant and respondent, the People were unable to prove any guilt.

Despite Motions for a directed verdict and arguments against proof of contempt, defendant was adjudged in contempt of court and sentenced to five years incarceration. From this sentence he appealed to the Appellate Court of Illinois, First District.

Since the Appellate Court's Opinion is set out in full in Appendix I, the facts therein contained are not repeated in this Statement of Facts. The dates of Appeal, affirmance, and denial of Leave to Appeal by the Supreme Court of Illinois have been previously set forth and are therefore not now restated.

REASONS FOR GRANTING WRIT

1. Statute of Limitations.

In *Gompers* v. *United States,* 233 U.S. 604 (1913) this Court dealt with the problem of the application of a limitation period in contempt cases. At that time the Federal limitation period for non-capital crimes was 3 years (233 U.S. at 607). In the *Gomper's* case, this Court reversed the lower court and said at page 612:

> "Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, if not by Congress by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years."

A case *directly in point,* both as to fact and law, is *Penergast* v. *United States,* 317 U.S. 412 (1943), where fraud was perpetrated on a Federal District Court and the defendants were held in contempt. This Court applied the three year statute of limitation, reversed the lower court and concluded its opinion with the following sentence: "It was therefore barred by the statute of limitations." (317 U.S. at 421).

In *Beattie* v. *People,* 33 Ill. App. 65 (1889), the Appellate Court of Illinois, First District, said at pages 661-662:

> "The Supreme Court of this State has uniformly held that acts in disrespect of the court, or its process, which obstruct the administration of justice, are in the

nature of criminal offenses. Stuart v. The People, 3 Scam. 395 (1842); Haines v. The People, 97 Ill. 161 (1890); The People v. Neill, 74 Ill. 68 (1874).

"In this the Supreme Court of the United States fully agrees, having decided that a contempt of that kind is a specific criminal offense, and the imposition of a fine, therefore, a judgment in a criminal case. New Orleans v. The Steamship Co., 20 Wal. 387."

The Court then concluded its opinion at page 665, as follows:

"The members of this court are all of opinion that the prosecution of the charge of contempt was barred by the statute of limitations, when this proceeding was commenced.

"The sentence of the Superior Court is reversed."

Under both Federal and Illinois law, a proceeding for criminal contempt is a criminal case for (a) the defendant has a right to a trial by jury, (b) the prosecution has the duty to prove defendant guilty beyond a reasonable doubt, and (c) the prohibition against double jeopardy is preserved so that the prosecution has no right of appeal. *United States* v. *Goldman,* 277 U.S. 229 (1928); *United States* v. *Hoffman,* 335 U.S. 77 (1948); *Bloom* v. *Illinois,* 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Co.,* 391 U.S. 216 (1968); *Frank* v. *United States,* 395 U.S. 147, 148 (1969); *Taylor* v. *Hayes,* 418 U.S. 488 (1974); *Cadispoti* v. *Pennsylvania,* 418 U.S. 506 (1974); *Menna* v. *New York,* 423 U.S. 61 (1975); *People* v. *Neil,* 74 Ill. 68 (1874); *People* v. *Barasch,* 21 Ill. 2d 407 (1961); *Estate of Melody,* 42 Ill. 2d 451 (1969); *People* v. *Bennett,* 51 Ill. 2d 282 (1972); *County of McLean* v. *Kicapoo Creek, Inc.,* 51 Ill. 2d 353 (1972); *O'Leary* v. *Alphin,* 64 Ill. 2d 500 (1976); *Marcisz* v. *Marcisz,* 65 Ill. 2d 206 (1976); *People* v. *Gray,* 69 Ill. 2d 44 (1977).

Indeed, since the prosecution stated the four specific dates in its amended petition and in its Bill of Particulars, the last date being January 6, 1970, and if, at trial, the prosecution introduced evidence of offenses on other dates, subsequent to January 6, 1970, then the defendant's constitutional right was violated under the Sixth Amendment to the Constitution of the United States which required that the defendant "be informed of the nature of the cause of accusation"; and the Sixth Amendment is applicable to the States by incorporation into the Fourteenth Amendment. *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Bloom* v. *Illinois,* 391 U.S. 194 (1968); *Shaw* v. *Illinois,* 394 U.S. 219 (1969). The Illinois period of limitations is three years, Ill. Rev. Stat. ch. 38 Sec. 3-5. Failure to apply it denied defendant "equal protection of the law".

2. The Appellate Court's Prolongation of the Statute of Limitation Violated Rights Guaranteed to this Defendant by the Constitution of the United States.

On pages Appendix 7, 8, 9, 10 of the Appellate Court opinion, the Court said inter alia:

> "The defendant's initial argument on appeal is that the statute of limitations bars this criminal contempt action. . . . The defendant alleges, . . . that the charges brought against him are barred by the general three-year statute of limitations for felonies. . . . He contends that all of the allegations set forth in the rule to show cause indicate that the last act of criminal contempt was complete on or before January 6, 1970 when the purported final account was filed. Therefore, he argues, since the first petition for a rule to show cause was filed on February 5, 1973, more than three years later, the suit is barred. We disagree.
>
> "The State alleges that the statute of limitations does not bar this action because the defendant was involved in a series of contemptuous conduct extending well into 1973.
>
> * * *

"Offenses such as conspiracy and embezzlement may involve a series of acts. Illinois cases have recognized that these are continuing offenses and are not complete until the last known act in furtherance of the offense has been completed. . . . As stated previously, the defendant claims that the last act was the filing of the final account on January 6, 1970. However, the evidence reveals that the defendant performed numerous acts in furtherance of the scheme to embezzle money from the estate well past 1970. For example, the final account stated that the defendant had paid over $28,000 in certain federal estate taxes when, in fact, these taxes had not been paid. On October 14, 1971, the Internal Revenue Service issued a statement that over $50,000 was due in estate taxes including interest and penalties. When it became evident that the estate taxes had not been paid, the defendant simply represented in a petition filed on September 30, 1971 to vacate the September 2, 1971 order discharging I. Harvey Levinson as administrator, that certain Internal Revenue matters had not yet been resolved. Subsequently, on March 15, 1972, the court ordered the administrator de bonis non to pay these estate taxes. In addition, the record reveals that the defendant failed to turn over various documents concerning the decedent's estate to interested parties after the final accounting. An attorney for the estate's surety testified at the contempt proceeding that he requested certain documents in 1970 but the first time the defendant turned over any documents to him was in February of 1972. Similarly, the defendant failed to comply with requests made in 1971 by Gelderman, as administrator de bonis non to turn over certain estate documents. . . ."

First, defendant was not charged with or tried for conspiracy or embezzlement. He was charged with filing on specific dates or aiding in the filing of false accounts, the last of which as alleged in the Rule to Show Cause occurred

on January 6, 1970. Furthermore, defendant was charged with misappropriating estate funds the last of which was accomplished, according to the proof and Bill of Particulars, in 1969.

None of the dates set forth by the Illinois Appellate Court and used for the first time in the Appellate Court, were set forth in the State's Bill of Particulars or charged in the Rule to Show Cause nor proven at the trial. While a Bill of Particulars in Illinois may not enlarge an offense or matter charged in the indictment, it and the charge limits not only the admissible proof but the proof used as a basis of a finding. *People* v. *Erris,* 342 Ill. 421, 174 N.E. 529 (1931), *People* v. *Dorsey,* 363 Ill. 403, 2 N.E. 2d 321 (1936). This is true in all criminal cases and the Illinois Appellate Court's failure to adhere to this is a violation of defendant's right to the law's equal protection as mandated by the XIVth Amendment to the United States Constitution.

Moreover, just as one cannot be convicted of a charge brought, nor upon evidence not substantiating that charge, so, we respectfully submit, the Appellate Court could not use as a basis for prolonging the Statute of Limitations upon charges not leveled against this defendant, nor introduced into evidence. *Cf. Thompson* v. *Louisville,* 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 369 U.S. 157 (1961), *Cole* v. *State of Arkansas,* 333 U.S. 196 (1948), *DeJong* v. *Oregon,* 299 U.S. 353 (1931), *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969), *In Re Oliver,* 333 U.S. 257 (1948).

We respectfully submit that the Illinois court has violated the defendant's rights that due process of law guaranteed by the Vth and XIVth Amendment to the United States Constitution.

Furthermore, the acts complained of as "prolonging" the statute of limitations, on their face have nothing to do with the filing of "false account" at the latest on January

6, 1970, nor of misappropriating funds in 1969. They were actions taken, over which defendant had no control and which he was not charged with. Furthermore, they were actions taken by others and as the court pointed out the estate continued well into 1975.

In *People* v. *Criswell,* 12 Ill. App. 3d 102, 105 (1973), followed with approval in *People* v. *Steinmen,* 57 Ill. App. 3d 887, 894 (1978), the Illinois courts adopted the rule laid down in *Gruenwald* v. *United States,* 353 U.S. 391 (1957) and said:

> "The three petitioners were convicted in the Federal District Court of conspiring to defraud the United States by preventing the criminal prosecution of certain taxpayers for fraudulent tax evasion. They had succeeded in obtaining 'no prosecution' rulings from the Bureau of Internal Revenue in 1948 and 1949 and their subsequent activities were directed at concealing the irregularities through which these rulings were obtained. They were not indicted until October 25, 1954, and the three year statute of limitations was pleaded as to certain counts."

In reversing and remanding, the Supreme Court of the United States, at pages 401-402, 403, 405, said:

> 'The crucial teaching of *Krulewitch and Lutwak* is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in the context

> of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commisison was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.
>
> * * *
>
> We find in all this nothing more than what was involved in *Krulewitch,* that is, (1) a criminal conspiracy which is carried on in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions.
>
> * * *
>
> * * * We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.' "

This is the established policy of the State of Illinois since the Statute of Limitations is to be liberally construed to be in favor of the defendant. The holding of the Illinois Appellate Court in this case—a continuation of acts not directly related to the charge—has been specifically rejected by Illinois in *People* v. *Adams,* 106 Ill. App. 2d 396 (1969),

Beattie v. *People,* 33 Ill. App. 651 (1889) and the rationale is stated in *People* v. *Ross,* 325 Ill. 417, 421 (1927). Yet, the application of this settled doctrine was denied to this defendant, thus again creating an equality in application of Illinois law to him in violation of the XIVth Amendment to the United States Constitution.

Next, as a reason for the prolongation of the Statute of Limitations the Illinois Appellate Court said (Appendix I pages 9-10):

> "At a hearing on February 18, 1972 the defendant stated that he would turn over everything in his possession concerning the decedent's estate to the administrator de bonis non but he refused to answer questions about the estate taxes on self-incrimination grounds. It is unclear from the record whether these documents were ever relinquished.
>
> "Also, the failure to report misstatements and the failure to restore estate funds constitutes elements of defendant's continuing fraudulent scheme which extended well past the date of the filing of the purported final account."

While the Illinois courts in *Criswell, supra* and in *People* v. *Heiss,* 257 Ill. 443, 451 (1913) specifically rejected the doctrine that the period of limitations is tolled because the defendant has a duty to 'turn himself in' and the duty to "incriminate" himself and rejected this for the specific purpose of avoiding the constitutional question, the Appellate Court also refused to apply applicable law thus denying this defendant again the equal protection of the laws.

However, in this case the court went a step further and said that the defendant from "his own lips" must incriminate himself and may not avail himself of those rights afforded him by the Vth Amendment to the United States Constitution.

Since the decision in *Mallory* v. *Hogen*, 378 U.S. 1 (1964) it is established that the Vth Amendment's prohibition against self incrimination as applied by the Federal system applies to the States through the XIVth Amendment. The essence of that "privilege" that absent the granting of immunity no person is compelled to either incriminate himself or to testify against himself unless he voluntarily chooses to do so and that privilege is the very foundation of those civil rights our forefathers fought for. *Mallory* v. *Hogen*, 378 U.S. 1 (1964); *In re Gault*, 387 U.S. 527, 557 (1967); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *United States* v. *Mandujano*, 425 U.S. 564 (1976). As this Court said in *Ullman* v. *United States*, 350 U.S. 422, 426 (1956):

> "Cardinal . . . is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that, in Hawkins' words, a prisoner is not 'to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown (8th ed. 1824), 595. . . . [The] essence [of the principle] is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Yet in effect what the Illinois Appellate Court held was that this defendant from his own lips should have brought about his conviction and by not doing so his contempt is continuous. As petitioner said in his Petition for Rehearing and Leave to Appeal "this makes a mockery of the privilege against self incrimination."

The above issues were not presented in the trial court. They were raised by the State of Illinois for the first time at the Appellate level and indeed the Court's opinion went

far beyond even the argument made. It was challenged on Constitutional grounds when they first were made known to petitioner and raised in both his Petition for Rehearing and his Petition for Leave to Appeal. Both were denied.

An affirmance of the Appellate Court's decision creates not only an unequal protection of the laws between one under indictment and one facing contempt charges, though both are crimes, *Bloom* v. *Illinois,* 391 U.S. 194 (1968), but also places a person dealing with the courts in the position that if he does not incriminate himself he has prolonged or committed contempt and that if he avails himself of that privilege not to convict himself from his own lips he again, without being granted immunity, is guilty of contempt, thus, not only making a mockery of his Vth Amendment rights, but making him a "second class citizen." Only review and reversal by this Court can remedy the wrong. *Slochower* v. *Board of Higher Education of N.J.,* 380 U.S. 551 (1955); *Lefkowitz* v. *Cunningham,* 430 U.S. 801 (1977).

3. Petitioner's Constitutional Rights Were Violated By the Unconstitutional Use of the Grand Jury.

A. Factual Situation.

On February 7, 1975 Petitioner filed a Motion to Suppress and Quash any and all evidence gathered by the Cook County, Illinois, Grand Jury on the grounds that the evidence by the Grand Jury was obtained after service upon petitioner of the Rule to Show Cause. Petitioner had also been before the Grand Jury after the service of the Rule to Show Cause and that the Grand Jury had returned a No Bill against this Petitioner; additionally, in violation of the Illinois Statute the Grand Jury proceedings had been used and released by the State's Attorney without prior

Court approval and in violation of the secrecy provisions of the Illinois Act. Petitioner claimed his Vth, IVth, VIth and XIVth Amendment rights.

The State filed an answer admitting the facts but alleging that no illegal search and seizure had taken place and the proceedings were released in the course of the State's Attorney's duties. The Motion was argued under the IVth and Vth Amendment to the Constitution of the United States. Subsequently the Motion was reargued under Petitioner's Motion claiming his IV, Vth and XIV Amendment rights had been violated. The trial court overruled the motions and the Appellate Court affirmed and said (Appendix I, pages 10, 11):

> "It appears that during the instant contempt proceedings, a grand jury investigation was undertaken in connection with the decedent's estate. At the contempt proceedings numerous documents, which several witnesses testified had been produced in response to a grand jury subpoena were introduced into evidence. . . .
>
> "Likewise, the defendant is incorrect in his assertion that the introduction of the documents violated his privilege against self-incrimination since he was nothing more than a mere custodian of these records by virtue of his involvement in the decedent's estate. . . . Finally, the record provides no evidence to suggest that the grand jury investigation connected to the instant case was instituted in bad faith . . . or in violation of grand jury secrecy."

In reality the facts were as follows:

1. Both respondents and defendants to the Rule were subpoened before the grand jury and ordered to give not only handwriting exemplars but to appear before the Chicago, Illinois police de

partment for handwriting analysis, both under compulsion of contempt and petitioner complied;

2. All of the respondents' personal bank and financial records were subpoened before the grand jury, and

3. All evidence, with the exception of the testimony of Albert Dorn was obtained from testimony given to the grand jury;

4. The documentary evidence was then released for the trial and used therein without obtaining an order of Court as required by Ill. Rev. Stat., Ch. 38, sec. 112-6, and

5. Without this evidence, and particularly that stated under items 1 and 2 above, the State could not have proved its case.

B. Petitioner's Right Against Self-Incrimination Was Violated By the State and the Evidence Should Have Been Suppressed.

At the outset it must be noted that the Grand Jury was used to gather evidence after the Rule to Show Cause was served upon this Petitioner, and while the People contended that it was part of an ongoing investigation, in fact, upon receiving all the evidence the People thought necessary to establish the contempt proceeding, the Grand Jury returned a no bill and was dismissed.

In a continuous line of decisions this Court has held that:

> "It is clear that the government may not in the absence of an intentional and knowing waiver call an

> indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged. Lawn v. United States, 355 U.S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958); United States v. Calandra, 414 U.S. at 345, 346, 38 L. Ed. 2d 561, 94 S. Ct. 613, 66 Ohio Ops. 2d 320. The Fifth Amendment requires suppression of any statements of the accused that were so obtained. True, as noted ante, at 573-574, 48 L. Ed. 2d 220, calling a person 'who may himself be the subject of the grand jury inquiry' is not a violation per se of the Fifth Amendment. United States v. Dionisio, 410 U.S. 1, 10 n. 8, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973). This general proposition may be justified as necessary to the basic policy that the public has a right to every man's evidence, United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974), but in my view it must yield in situations risking vast potential for abuse in the absence of further safeguards calculated to preserve the policies underlying our adversary system."

United States v. *Mandajuno*, 425 U.S. 564, 594 (1976) and the reason for the rule is:

> "In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice. . . . *That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures.*"

425 U.S. at 593, and

> "Such tactics by prosecutors are exemplars of the very evils sought to be prevented by the enshrinement of the Fifth Amendment privilege in the Constitution. In giving those tactics our stamp of approval we turn our backs on our recognition heretofore that it is crucial that courts 'be "alert to repress" any

> abuses of the investigatory power invoked, bearing in mind that . . . "the most valuable function of the grand jury . . . [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused." ' "

425 U.S. 598.

More recently the 6th Circuit in *United States* v. *Doss,* 545 F. 2d 548, aff'd in banc 563 F. 2d 265, 274-279 (6th Cir. 1977) had occasion to rule on the subject and to decide that an already indicted defendant could not be summoned before a Grand Jury and there inquested concerning the very crime he stood already indicted for.

This defendant was compelled to give his handwriting exemplars by virtue of *United States* v. *Dionisio,* 412 U.S. 1 (1973). If they had been called before the Grand Jury prior to any charge being made against them no doubt they would under that decision have had to comply. However, after the charge is levied this is tantamount to the court saying "we may call this charged defendant at the time of trial and question him even if he is only compelled to give his handwriting and thus expose him to the vulnerability of taking the 'Vth' something this court has time after time rejected." *Cf. Griffen* v. *State of California,* 380 U.S. 609 (1965), Ill. Rev. Stat. Ch., 38, sec. 155-1.

The court in *United States* v. *Doss, supra,* 563 F.2d 265, said at page 276:

> "The function of the grand jury clearly terminates with the issuance of the indictment. It has no relationship to the trial itself. We find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already indicted defendant. Such a use of the grand jury would pervert its constitutional and historic function."

The reasoning of the court was that indeed such a use of Grand Jury destroyed the adversary system of American jurisprudence in violation of the Vth Amendment to the Constitution of the United States. That situation here exists and if the holding is affirmed defendant already charged may be called before the Grand Jury to give testimony against themselves without the ability to rebut that evidence or cross examine without waiving their Vth Amendment rights.

C. The Grand Jury Was Without Jurisdiction to Act Therefore all Action and Evidence Gathered by it Was Inadmissible.

The People admitted and the evidence proves that all the documentary evidence used and most of the oral evidence used were obtained by the Grand Jury. The State also and the evidence proves that that evidence was gathered after the Rule to Show Cause was served upon defendant and respondent and thereafter the grand jury returned a "no bill".

An awesome inquisitorial ancient investigating body—THE GRAND JURY IN ILLINOIS, 1973 Ill. Law Forum 635; *History Of The Grand Jury,* 63 N.W. L. Rev. 209 (1966), it stands independently between the people and the sovereign to thwart the sovereign's power to accuse without foundation, its "task" was and is "now to inquire into the existence of possible criminal conduct and to return only well founded indictments." *Bradeburg* v. *Hayes,* 408 U.S. 665, 688, 992 S. Ct. 2648, 33 L. Ed. 201, 626, 642 (1974).

It exists in Illinois not as a common law, an independent instrument, but as a legislatively created arm of the Circuit Court closely resembling Rule 6 of the Federal Rules

of Criminal Procedure whose decision should be used in its interpretation. *People* v. *Sears*, 49 Ill. 2d 14 (1971), *People* v. *Romiti*, 50 Ill. 2d 51 (1971).

Ill. Rev. Stat. Ch. 38, §112-4, provides:

> "Duties of Grand Jury and State's Attorney
>
> (a) The Grand Jury shall hear all the evidence presented by the State's Attorney.
>
> (b) The Grand Jury shall have the right to subpoena and question any person against whom the State's Attorney is seeking an indictment.
>
> • • •
>
> (d) If 12 Grand Jurors concur that the evidence before them constitutes probable cause that a person has committed an offense the State's Attorney shall prepare a Bill of Indictment . . .
>
> (e) When the evidence presented to the Grand Jury does not warrant the return of a Bill of Indictment the State's Attorney prepares a written memorandum to such effect, entitled "No Bill".

Ill. Rev. Stat. Ch. 38, §102-15 states:

> "offense" means a violation of any penal statute of the state

And, indictment is defined by Ill. Rev. Stat. Ch. 38, §102-11 as follows:

> "indictment" means a written statement, presented by the Grand Jury to a Court which charges the commission of an offense.

However, contempt, although brought in the name of the People of the State of Illinois, is not an offense against the sovereign. It is an offense against the *Court* and is not included within "indictable" "offenses" in the criminal code. *People* v. *Goss*, 10 Ill. 2d 533, 131 N.E. 2d 385 (1957). This is true under the Federal Act as well. *Green* v. *United States*, 356 U.S. 165, 188 ft. nt. 20 (1958).

While it is true that contempt may arise from the same set of facts that give rise to an offense against the State, it is a separate offense against the Court. *People* v. *Bloom*, 35 Ill. 2d 255, 220 N.E. 2d 475 rev. on other grounds, 391 U.S. 194 (1966); *People* v. *Goss*, 10 Ill. 2d 533 (1957).

It is a crime only because of the imposition of punishment. *People* v. *Bloom, supra.*

Since "contempt" is not included as an "offense" in the Criminal Code and is not "chargeable" in an "indictment", it follows under the well-founded statutory construction principal of *inclusio unius est exclusio alterius* e.g., *Dick* v. *Roberts*, 8 Ill. App. 2d 215, 218, 219 (1956); *People* v. *Criswell*, 12 Ill. App. 3d 102, 108 (1973). That the Grand Jury lacks jurisdiction to hear or gather evidence.

However, we need not use rules of construction since the courts have already ruled upon this subject.

In *People* v. *Polk*, 21 Ill. 2d 594, 598 (1961) the Illinois Supreme Court said at page 599:

> "Although we have stated a court cannot limit the scope of the grand jury's investigation, (*People ex rel. Ferrill* v. *Graydon*, 333 Ill. 429), it is equally true that a grand jury has no right or jurisdiction to conduct an investigation into the personal affairs of citizens when there is no charge of a criminal offense involved, or where it otherwise lacks jurisdiction of the subject matter. *Pankey* v. *People*, 1 Scam. 80; *People* v. *Rogers*, 348 Ill. 322."

In *People* v. *Pankey*, 2 Ill. 80 (1833), the question was twofold: whether the indictment returned was valid and whether the evidence gathered by the grand jury was within its jurisdiction so that perjury could be based thereon. The Supreme Court reversed the Circuit Court and in the words of *People* v. *Polk, supra*, 21 Ill.2d 599, said:

> "Our decision in *Pankey* v. *People*, 1 Scam. 80, is not in point as there the record clearly showed the sub-

> ject matter under investigation by the grand jury to be civil in nature, and not criminal. See also 22 A.L.R. 1366."

The rule laid down in *Panaky*, 2 Ill. 82 (1833), was that the evidence obtained by the grand jury's action since it was without jurisdiction, it could not indict for a crime committed.

In *People* v. *Polk*, 21 Ill. 2d 594, 601, 602 (1961) the Illinois Supreme Court speaking of Grand Jury jurisdiction, to gather evidence adduced before it when that body lacked jurisdiction and then effect of the Statute of Limitations disclosure before that Grand Jury cited with approval an Oklahoma case, the Illinois Supreme Court said at pages 601-602:

> "Defendant relies on the case of *Bennett* v. *District Court of Tulsa County*, 81 Okla Cr. 228, 162 P.2d 561. The facts therein indicate that a Tulsa County, Oklahoma, grand jury had been charged to investigate an alleged criminal conspiracy, all the overt acts of which clearly appeared from the outset to have occurred in Oklahoma County, Oklahoma; all such overt acts, moreover, had occurred more than three years prior to the date of the indictment action in Tulsa County. The defendant, Bennett, who had testified before the grand jury, was subsequently indicted by the Tulsa grand jury for the conspiracy which had been the subject of investigation. The defendant's motion to quash the indictment was allowed by the trial court and affirmed by the Oklahoma Criminal Court of Appeals (see *State of Oklahoma* v. *Bennett*, 81 Okla. Cr. 206, 162 P.2d 581), on the ground that the Tulsa county trial court had been without jurisdiction of the alleged offense because of its occurrence wholly in another county and because prosecution was barred by a three-year Statute of Limitation. Defendant, however, was also indicted for perjury committed before the Tulsa grand jury in the course of its investigation. The Criminal Court of Appeals in the case cited by defen-

> dant, 162 P.2d 561, quashed the perjury indictment because: 'All the evidence before the grand jury revealed that if any offense had been committed it had been committed in Oklahoma County and not in Tulsa County * * *' and therefore the questions asked were 'not material to the issue before the grand jury,' inasmuch as 'where a court or body does not have jurisdiction of the subject matter, perjury cannot be based upon false testimony given at such hearing or trial * * * neither the court nor the grand jury had jurisdiction of the subject matter * * *.' ''

In *Brown* v. *United States,* 245 F. 2d 549 (8th Cir. 1957), cited with approval by all opinions in *United States* v. *Mandajuno,* 425 U.S. 564 (1976), a grand jury in Nebraska gathered the evidence for an indictment in Missouri. The Circuit Court of Appeals held the indictments and all evidence void because the grand jury in Nebraska lacked jurisdiction to hear the matter.

Furthermore, the purpose of the Grand Jury is to stand between the sovereign and the people and not between the courts. Since the reason for its investigating power does not exist in a contempt proceeding, it follows that it possesses no power to investigate offenses to the "court". See e.g., *Brandeburg* v. *Hayes,* 408 U.S. 655, 686, 687 (1974); *Green* v. *United States,* 356 U.S. 165 (1958).

No decision on this subject exists in Illinois. The Federal Act and the Illinois State Statutes are fairly similar. *Compare* Title 18 U.S.C. Sec. 6 *with* Ill. Rev. Stat. Ch. 38, §112-4. At times, this court has relegated the Illinois courts to follow federal interpretations. *People* v. *Sears,* 49 Ill. 2d 14 (1971).

The Federal Courts have steadfastly held that United States prosecutors may not use evidence gathered by a Grand Jury for matters other than an indictment unless

an indictment is returned. If the jury has been impaneled for reasons other than an indictment its evidence is unusable.

> "It is improper to utilize a Grand Jury for the sole or dominate purpose of preparing an already pending indictment for trial."

United States v. *Dardi,* 330 F. 2d 316, 336 (2nd Cir. 1964). *In accord: Beverly* v. *United States,* 469 F. 2d 732, 743 (5th Cir. 1972); *United States* v. *Star,* 470 F. 2d 1215 (9th Cir. 1974), for the best discussion see *United States* v. *Doss,* 545 F. 2d 548 (Cir. 6th 1976) decision aff'd after rehearing en banc, 563 F. 2d 265 (1977).

The import of the decisions is that the use of a Grand Jury for trial discovery violates all of its proceedings including its evidence since it constitutes an abuse of process by the prosecution.

Similarly, the United States Courts have held that Grand Jury evidence is not available to the prosecutor if the Grand Jury obtaining it was called, not to return an indictment but for use in other proceedings and "the Grand Jury process is subverted . . ." *Robert Hawthorne* v. *Director of Internal Revenue,* 406 F.Supp. 1098 (E. D. Pa. 1976) *In re Grand Jury Proceedings,* 374 F. Supp. 1334 (N.D. Ill. 1973), *In re Grand Jury Proceedings,* 445 F. Supp. 349 (R. I. 1975), *December Grand Jury Term,* 449 F. Supp. 743 (Md. 1974).

We respectfully submit that the State of Illinois used the Grand Jury to gather facts on matters it had no jurisdiction of and to discover facts for trial of this cause.

If the position advanced by the People, sustained by the Trial and Appellate Court, is adopted by this Court, then the State will be furnished with a weapon it may use in

a fashion not contemplated by the legislature, not contemplated by common-law and in effect will become a "tool" against the individual citizen since the Grand Jury is controlled by the prosecutor. Judge Campbell, 55 F.R.D. 229, Mr. Justice Douglas in *United States* v. *Dionisio,* 410 U.S. 1 (1973).

While the United States Supreme Court has not directly held testimony received by a grand jury to be a violation of the IVth Amendment, Mr. Justice Douglas said in *United States* v. *Dionisio,* 410 U.S. at 27:

> "The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenas duces tecum that are overly broad. Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in Davis, supra, and reiterated in Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" Id., at 9.

The Federal court cases above cited have, however, held the evidence to be inadmissible because obtained through an abuse of process. Whether coached in terms of "an abuse of process" or a IVth Amendment violation it is evident that in Illinois as well as under the Federal Act the evidence obtained by a Grand Jury without its having jurisdiction is inadmissible. Thus the court's failure to suppress constitutes not only a violation of the IVth Amendment but the Vth as well. In addition, since the rule applied in *Panakey, supra,* affirmed in *Polk, supra,* was not applied to this defendant, this petitioner was deprived of the equal protections of the laws of the State of Illinois forbidden by the XIVth Amendment to the United States Constitution.

The evidence should have been suppressed and declared not usable and hence the conviction reversed. Cf. *People* v. *Rogers,* 348 Ill. 322, 325, 326 (1932). A failure to do so also creates an unequal application of the laws of Illinois to the detriment of this petitioner.

4. Defendant Was Convicted of a Crime He Was Not Charged With In Violation of His Constitutional Rights and This Lead to the Imposition of a Sentence Prohibited by the Constitution.

The charge in the Rule to Show Cause is contained in the State's prayer for relief which reads:

> "Wherefore, petitioners . . . for the reasons hereinabove stated, pray that this Court enter an order . . . requiring . . . respondents (and defendant) to show cause . . . why they should not be found in contempt of Court and punished according to the law for their failure to comply with the orders of this court and for conduct committed in open court by representations and affidavits which tended to embarrass or obstruct the court in the administration of justice and which brought the administration of law in this Honorable Court in disrepute. . . ."

On October 23, 1973, the State filed a Bill of Particulars. The central core of that Bill of Particulars is aptly summed up in paragraph 7(a) thereof which states:

> "The People assert that these facts together with the facts alleged in paragraphs 12, 13 and 14 of the People's Amended Petition and Exhibit A and B of the People's Amended Petition and Exhibit A of the People's Bill of Particulars, constitute separate and distinct acts of contemptuous conduct on the part of Melvin E. Levinson as to each and every item regarding the disposition of the stock assets falsely reported to the Court in each and every of the aforementioned accountings, to wit: February 16, 1968; June 28, 1968 and November 21, 1969. Such facts also constitute

> separate and distinct acts of contemptuous conduct by Melvin E. Levinson as to each and every such item which was falsely reported to the Court in the Final Account filed January 6, 1970, by the Administrator, as Melvin E. Levinson assisted said administrator in the disposition of such assets and in the preparation and filing of said Final Account."

Indeed, the Bill of Particulars would of necessity have to conform to the charge because under the laws of the State of Illinois while the Bill of Particulars may "limit" the charge it may not "enlarge" it. *People* v. *Johnson*, 363 Ill. 45, 49 (1936), *People* v. *Westrap*, 372 Ill. 517 (1939).

On March 17, 1975, a Motion to Dismiss was filed by the defense alleging, among other things:

> "1. That the Petition for a Rule To Show Cause as filed herein does not clearly inform the Defendant, Melvin Levinson, of the nature of the alleged acts for which the State of Illinois intends to enter evidence at time of trial or for which the Defendant, Melvin Levinson, must make defense to, in that the State of Illinois is not proceeding against I. Harvey Levinson, and the Petition for the Rule to Show Cause alleges acts of I. Harvey Levinson which are stated to be done by and through, Melvin Levinson. All in violation of the Defendant, Melvin Levinson's rights under the 5th and 14th Amendments of the Constitution of the United States of America and the Constitution of the State of Illinois, Article I, Section 2 of 1970."

and also claiming defendant's rights under the IVth, Vth, VIth and XIVth Amendment to the United States Constitution. The Motion was denied.

The People did prove that there was a misappropriation of estate funds ending in 1969, and it was upon this misappropriation and not the charge levied against this defendant that the trial court made the following finding:

> "The estate of Leo Ziv, deceased, was opened in the Probate Division of the Circuit Court of Cook

> County, Illinois, on September 9, 1965. Attorney I. Harvey Levinson was appointed and duly qualified as administrator. Thereafter, in January, 1966, the administrator retained his son, Melvin E. Levinson, as attorney for the estate. (Parenthetically, it may here be mentioned that Melvin E. Levinson was disbarred in Illinois on a date not furnished to this Court.) As to the size of the estate, the same consisted of corporate stocks, bonds, cash and other assets totaling about $300,000.00. The common stocks fluctuated in value.
>
> This Court finds and holds that the People of the State of Illinois have proved their case beyond a reasonable doubt; and finds and holds that Melvin E. Levinson converted to his own use $104,682.03 belonging to the estate. This Court further finds and holds Melvin E. Levinson guilty of criminal contempt by the Probate Division of the Circuit Court of Cook County, Illinois, as charged by the People. This Court will enter judgment accordingly."

Thus, defendants fears were well founded and this finding of guilty of misappropriation of funds, although not charged, lead to the imposition of a five year sentence commensurate with that imposed for embezzlement.

The Illinois Appellate Court likewise fell into the same "trap." It time after time classified the offense different than the charge. In regard to the Statute of Limitations, it said e.g.:

> "Offenses such as conspiracy and embezzlement may involve a series of Acts." (App. p. 8);
>
> "However, the evidence reveals that the defendant performed numerous acts in furtherance of the scheme to embezzle money . . . ." (App. p. 9)

Again in speaking of excluded evidence (not herein raised) the Appellate Court said:

> "At best, the excluded evidence could have shown the defendant was a reluctant participant in the scheme to defraud the estate . . . " (App. p. 12)

and finally in affirming the sentence the Appellate Court of Illinois said:

> "In the case at bar the trial court was presented with an attorney who embezzled funds from a very large estate . . . in light of the higher standard of conduct imposed upon attorneys . . . the sentence was proper. . . ." (App. p. 13).

It is therefore apparent that both the trial court and the Illinois Appellate Court found this defendant guilty of "embezzlement misappropriation or a scheme to defraud" all of which ended in 1969 and not for "filing false affidavits . . . . (accounts) which tended to embarrass the court or hinder the administration of justice as charged in the Peoples' Petition and thus this defendant stands convicted of a crime he was never charged with in violation of the XIVth Amendment to the Constitution of the United States. *Thompson* v. *Louisville,* 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 369 U.S. 157 (1961), *Cole* v. *State of Arkansas,* 333 U.S. 196 (1948), *DeJong* v. *Oregon,* 299 U.S. 353 (1931), *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969), *In Re Oliver,* 333 U.S. 257 (1948).

Because of the trial and Appellate Courts misconception of the nature of the crime charged the limitations contained in the Illinois Constitution which provide:

> Ill. Const. Art. 1, Sec. 11—Limitation of Penalties After Conviction
>
> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

And which the courts have consistently held are binding on the courts in a contempt proceeding. *People ex rel. Rausch*

v. *Grabrez*, 309 Ill. App. 443 (1941), *People ex rel. Rausch* v. *Levine*, 305 Ill. App. 142 (1940) and constitute a limitation on the court's sentencing power. *People* v. *Howell*, 16 Ill. App. 2d 989, Aff'd 60 Ill. 2d 117 (1974) were not accorded this defendant.

Had the conviction been for the "charge" under the evidence the court would have been obliged, even if other constitutional impediments exist, to have rendered a minimal sentence under the Constitutional guidelines set by the Appellate and Supreme Courts of Illinois, *e.g. In re Shapiros Estate*, 43 Ill. App. 2d 78 (1963); *People* v. *Sherwin*, 354 Ill. 371 (1934); *Dramen* v. *Fields*, 406 Ill. 153 (1950); *People* v. *Hodge*, 23 Ill. 2d 425 (1961); *People* v. *Brown*, 30 Ill. App. 3d 828 (1975).

Instead the trial court merely swept away these decisions since it found the defendant guilty of a crime not charged and the Appellate court simply stated:

> "The power of a court to punish for contempt does not depend on constitutional or legislative grant, . . ."

Thus, we respectfully submit, the conviction was based upon a charge not made, in violation of the mandate of the XIVth Amendment to the United States Constitution and the defendant was denied the right to have his sentence limited "to the seriousness of the offense" as required by the Illinois Constitution, hence deprived of his right to have the laws of Illinois applied as equally to him as to others accused of a crime also in violation of the mandate of the XIVth Amendment to the United States Constitution. *Cf. More* v. *Missouri*, 159 U.S. 673 (1895), *Columbus Board of Education* v. *Penick*, 436 U.S. 149 (1978).

CONCLUSION

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Appellate Court of Illinois, First District, in this case.

Respectfully submitted,

HARRY G. FINS
Chicago, Illinois

Attorney for petitioner

APPENDIX

APPENDIX I

Opinion of Appellate Court

(75 Ill. App. 3d 428, 394 N.E.2d 509)

MR. JUSTICE CAMPBELL delivered the opinion of the court:

At the conclusion of a bench trial the defendant, Melvin E. Levinson, was found guilty of criminal contempt and was sentenced to five years imprisonment.

On appeal the defendant presents the following issues for review: (1) whether the statute of limitations bars the prosecution of the defendant for criminal contempt; (2) whether documentary evidence was properly admitted at the trial where such evidence was first obtained by a grand jury; (3) whether the defendant was properly precluded from testifying as to prior conversations with his co-defendant father; and (4) whether the sentence was illegal and excessive. We affirm.

Both parties have stipulated as to the contents of the record on appeal and no issue has been raised as to the sufficiency of the proof or any question relating to proof of guilt beyond a reasonable doubt.

Leo Ziv (decedent), an Illinois resident, died intestate on September 4, 1965, leaving a substantial estate consisting mainly of stocks and cash deposited in large part with various banks in safety deposit boxes and savings accounts. The only surviving heirs were the decedent's three sisters, Sylvia Kessler, Flo Ziv and Bertha Pinsky, and his brother, Sol Ziv, all of whom resided in California. On September 9, 1965, I. Harvey Levinson, an attorney with offices in Chicago, was appointed administrator of the decedent's estate by the circuit court of Cook County, Probate Division, at the request of the aforementioned heirs. Shortly

thereafter attorney Melvin E. Levinson, the son of I. Harvey Levinson and the defendant herein, was retained by his father as attorney for the estate. The administrator and the defendant shared the same suite of offices during the initial phases of the administration of the estate.

In view of the absence of any issue raised on appeal as to the sufficiency of the evidence, it is unnecessary to set forth all of the facts in detail surrounding the handling of the estate by the administrator and the attorney for the estate. It is sufficient for our purposes to briefly set forth the allegations contained in the amended petition for a rule to show cause for criminal contempt and as established by the proof in this cause. The petition alleges generally and the proof establishes that the defendant inter alia committed the following acts:

(1) The defendant and the administrator of the estate sold the decedent's substantial stock holdings without leave of court and then deposited the proceeds in various bank accounts in the name of the estate and proceeded to withdraw the same or similar amounts on the same day or within a few days of the initial deposit without leave of court.

(2) The defendant endorsed some of these deposited checks, signed the signature cards on file at the banks, as well as other documents, in the name of the administrator.

(3) The defendant filed or participated in the filing of various inventories with the probate court containing false reports as to the assets in the decedent's estate. For example, an amended inventory prepared by the defendant was filed on July 29, 1966. The defendant failed to list $57,885 discovered by the administrator in a safety deposit box at First Federal Savings and Loan which was owned jointly by the decedent and his brother, Sol Ziv.

The $57,885 was listed in subsequent inventories only after its omission was discovered by other parties.

(4) On or about September 13, 1967, the defendant received a check drawn on the Exchange National Bank for $6,000 from Diamond Jim's Inc. which was made payable to the administrator. Of the said $6,000, $5,000 was for the settlement of a debt due the decedent and $1,000 represented the proceeds from the sale of 12½ shares of Diamond Jim stock. No portion of said $6,000 was listed as having been received by the estate in any accounting filed by the defendant or the administrator. Nor was any portion of said $6,000 distributed to the heirs.

(5) The defendant knew of certain dividends received by the administrator which should have been included as assets of the estate. The administrator failed to report, account for, or distribute $14,254.94 in said dividends.

(6) The defendant filed or participated in the filing of accounts on February 16, 1968, June 26, 1968, November 21, 1969 and again on January 6, 1970, which had attached to them vouchers indicating that the accountant for the estate had signed for and had been paid $2,500 when in fact the accountant had received approximately $1,000 and had not signed the attached vouchers.

(7) The defendant signed the name of the administrator on the account filed November 21, 1969. This account indicated that $28,475.14 in federal estate taxes had been paid when, in fact, they had not been paid. Also the defendant knowingly participated in the preparation and filing of a final account entitled "Returns and Disbursements" on January 6, 1970. This final account indicated again that said taxes had been paid when in fact they had not been paid and further indicated that a receipt had been obtained from the federal government for said payment when no such receipt had been issued or received.

(8) The final account also indicated that $12,000 had been distributed to the heirs when in fact no such distribution had taken place. No receipts were attached to this account indicating that the heirs had received all or any part of this sum.

(9) In addition, the final account indicated that the heirs had received certain shares of the decedent's stock when in fact no such distribution of said shares was made and no vouchers reflecting such distribution was attached to the final account.

(10) The defendant failed to advise the Court of misstatements in the final account in the period subsequent to the filing of the final account.

(11) The defendant and the administrator prolonged the administration of the estate necessitating the hiring of a California attorney by the heirs to investigate the handling of the estate.

(12) The defendant and the administrator deliberately misrepresented the status of the estate and failed to cooperate with the California attorney necessitating the additional hiring of an Illinois attorney to examine the handling of the estate.

(13) The defendant failed to cooperate with respect to turning over certain documents of the estate to the California or Illinois attorney, or to the other interested parties involved in the administration of the estate.

(14) The defendant and the administrator wilfully and wrongfully converted to their own use $136,252.98 or more from the estate and refused to restore said funds or properly distribute the same in breach of their fiduciary duty to the estate.

These are some of the acts alleged in the amended petition for a rule to show cause and as established by the proof in this cause. There is ample evidence to demonstrate other improprieties on the part of the defendant and no question is presented on appeal as to the sufficiency of the evidence of guilt beyond a reasonable doubt.

Although the record is unclear as to when the defendant withdrew as the estate's attorney, the defendant testified at the trial that he had nothing further to do with the estate after the filing of the November 25, 1969 final account. The record reveals that on November 26, 1969, Ira Schultz was granted leave to file his appearance as the attorney for the estate by court order.

On September 2, 1971, I. Harvey Levinson was removed as administrator and Gregory Gelderman, a Chicago attorney, who had been appointed previously amicus curiae to investigate the estate was appointed administrator de bonis non on October 26, 1971. Gelderman immediately began making collections from the surety of the estate to recover the assets of the estate. He also began making distributions of the estate's assets to the heirs. The recovery and collection process ran from February 22, 1972 through March 8, 1974 by Gelderman and he was further directed by court order to pay, on March 15, 1972, the federal estate taxes alleged to have already been paid.

On November 22, 1971, Gelderman filed a rule to show cause against both Levinsons to recover the assets of the estate and against the defendant specifically for failure to deliver the estate's books and records. Continuances were granted to both Levinsons on the rules to show cause. Thereafter, on February 25, 1972, the State filed a motion for the defendant to produce certain documents. Several witnesses testified that the defendant had not been co-

operative with respect to turning over documents of the estate.

On February 5, 1973 the State of Illinois by leave of court filed a petition for rule to show cause directed against both Levinsons as to why they should not be held in criminal contempt of court for conduct which had obstructed the administration of justice. On March 21, 1973, the State, with leave of court, filed an amended petition for rule to show cause and a second amended petition was filed on June 28, 1973. This later amended petition for rule to show cause forms the basis of this appeal.

In March of 1973, while the above proceedings were pending in the Probate Division, there was a Cook County grand jury investigation looking into the conduct of the defendant and I. Harvey Levinson in connection with the decedent's estate. Subpoenas were issued and evidence was gathered which was later introduced at the contempt trial.

The contempt action was continued from time to time and on April 23, 1974, the defendant filed a motion to dismiss the second amended petition on the grounds that the suit was barred by laches and the statute of limitations. Also, on June 6, 1974, the defendant filed a motion to quash and suppress the evidence obtained by the grand jury process claiming that the petition and answers to the bill of particulars in the instant case were based in part upon information obtained from secret grand jury proceedings. Both of these motions were denied.

On January 5, 1975, I. Harvey Levinson was adjudged incompetent to stand trial. The case proceeded to trial against the defendant on March 22, 1976 and the defendant waived his right to a jury trial.

At certain portions of the defendant's testimony, objections were raised and sustained on hearsay grounds when the defendant attempted to relate the content of several conversations with his father. The defense was later permitted to make an offer of proof as to these conversations over the State's objection. The court later sustained the State's objection to this offer of proof but allowed it to stand in the record. In this offer of proof the defendant stated that he and his father frequently quarreled over matters concerning the decedent's estate. The defendant testified that he acted only at his father's direction and insistence with regards to the handling of the estate's assets.

On May 25, 1976 the defendant was found guilty of criminal contempt. On May 27, 1976 a hearing in aggravation and mitigation was held. In aggravation it was revealed that the defendant had been disbarred. The defendant did not present any matters in mitigation. The defendant was sentenced to five years imprisonment.[1] It is from his conviction for criminal contempt that the defendant brings the present appeal.

The defendant's initial argument on appeal is that the statute of limitations bars this criminal contempt action. At oral arguments the defendant abandoned the argument set forth in his brief that the offense was subject to the 18-month statute of limitations for misdemeanors (see Ill. Rev. Stat. 1975, ch. 38, par. 3-5). The defendant alleges, however, that the charges brought against him are barred by the general three-year statute of limitations for felonies (see Ill. Rev. Stat. 1975, ch. 38, par. 3-5). He contends that all of the allegations set forth in the rule to

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[1] The defendant's attorney revealed at oral arguments that the defendant had been released on $100,000 bond pending appeal.

show cause indicate that the last act of criminal contempt was complete on or before January 6, 1970 when the purported final account was filed. Therefore, he argues, since the first petition for a rule to show cause was filed on February 5, 1973, more than three years later, the suit is barred. We disagree.

The State alleges that the statute of limitations does not bar this action because the defendant was involved in a series of contemptuous conduct extending well into 1973. In *People ex rel. Chicago Bar Association* v. *Barasch* (1961), 21 Ill. 2d 407, 173 N.E. 2d 417, the respondent was charged, on March 18, 1958, with criminal contempt for holding himself out to the public as qualified to perform legal services and engaging in the unauthorized practice of law. The charge was based primarily upon letters written by the respondent on February 5, 1953, January 5, 1956 and two dates in 1957. The court held that the statute of limitations was not a bar and that under the circumstances it was not unfair or unjust to make inquiry of the respondent's conduct dating back to 1953. The court explained that "(i)n some cases the statutory period of limitation might be considered too long, while in others, such as a series of contemptuous conduct over an extended period of time, might justify charges long after the statutory period of limitation." (*Barasch* at 412.) Without addressing the issue of whether a strict application of the statute of limitation is warranted in the instant appeal, we hold that the statute of limitations is not a bar to this acion.

Offenses such as conspiracy and embezzlement may involve a series of acts. Illinois cases have recognized that these are continuing offenses and are not complete until the last known act in furtherance of the offense has been completed. (*People* v. *Adams* (1969), 106 Ill. App. 2d 396, 245 N.E.2d 904; *People* v. *Konkowski* (1941), 378 Ill. 616,

39 N.E.2d 13.) As stated previously, the defendant claims that the last act was the filing of the final account on January 6, 1970. However, the evidence reveals that the defendant performed numerous acts in furtherance of the scheme to embezzle money from the estate well past 1970. For example, the final account stated that the defendant had paid over $28,000 in certain federal estate taxes, when, in fact, these taxes had not been paid. On October 14, 1971, the Internal Revenue Service issued a statement that over $50,000 was due in estate taxes including interest and penalties. When it became evident that the estate taxes had not been paid, the defendant simply represented in a petition filed on September 30, 1971 to vacate the September 2, 1971 order discharging I. Harvey Levinson as administrator, that certain Internal Revenue matters had not yet been resolved. Subsequently, on March 15, 1972, the court ordered the administrator de bonis non to pay these estate taxes. In addition, the record reveals that the defendant failed to turn over various documents concerning the decedent's estate to interested parties after the final accounting. An attorney for the estate's surety testified at the contempt proceeding that he requested certain documents in 1970 but the first time the defendant turned over any documents to him was in February of 1972. Similarly, the defendant failed to comply with requests made in 1971 by Gelderman, as administrator de bonis non to turn over certain estate documents. At a hearing on February 18, 1972 the defendant stated that he would turn over everything in his possession concerning the decedent's estate to the administrator de bonis non but he refused to answer questions about the estate taxes on self-incrimination grounds. It is unclear from the record whether these documents were ever relinquished.

Also, the failure to report misstatements and the failure to restore estate funds constitutes elements of the de-

fendant's continuing fraudulent scheme which extended well past the date of the filing of the purported final account.

The defendant cites *Beattie* v. *The People* (1889), 33 Ill. App. 651, in support of his statute of limitations argument. However, *Beattie* is distinguishable from the instant case in that it concerns a specific offense as opposed to a continuous offense carried out over a period of time. The defendant's conduct in the instant case clearly falls into the category of a continuing offense as set forth in *People* v. *Adams* (1969), 106 Ill. App. 2d 396, 245 N.E.2d 904; *People* v. *Konkowski* (1941), 378 Ill. 616, 39 N.E.2d 13. Consequently, since the present action was commenced with the first filing of a petition for rule to show cause on February 5, 1973 and since the defendant embarked upon a course of conduct in furtherance of his illegal acts and doings well past 1970, the suit is not barred by the applicable statute of limitations. See Ill. Rev. Stat. 1975, ch. 38, sec. 3.5.

The defendant's second contention is that his conviction should be reversed because it was based almost entirely upon evidence gathered through an abuse of the grand jury process and in violation of grand jury secrecy. We disagree.

It appears that during the instant contempt proceedings, a grand jury investigation was undertaken in connection with the decedent's estate. At the contempt proceedings numerous documents, which several witnesses testified had been produced in response to a grand jury subpoena were introduced into evidence. These documents included records of the defendant's, his father's personal bank accounts opened ostensibly for the decedent's estate, as well as other papers directly connected with the estate.

The Illinois Supreme Court has held that where a defendant does not claim a possessory interest in the evidence seized, he has no standing to complain of its use at trial. (*People* v. *French* (1965), 33 Ill. 2d 146, 210 N.E.2d 540.) In the instant case the evidence clearly indicates that the defendant did not have a possessory interest in the subpoenaed documents. These documents were the possessions of the decedent's estate which came into the hands of the defendant and his father only in their respective capacities as attorney and administrator of the estate, Therefore, the defendant has no standing to object to the introduction of these documents at the trial. Furthermore, the same document could have been produced at the trial absent any grand jury subpoena.

Likewise, the defendant is incorrect in his assertion that the introduction of the documents violated his privilege against self-incrimination since he was nothing more than a mere custodian of these records by virtue of his involvement in the decedent's estate (see *People* v. *Ryan* (1952), 410 Ill. 486, 103 N.E.2d 116.) Finally, the record provides no evidence to suggest that the grand jury investigation connected to the instant case was instituted in bad faith (see *People* v. *Polk* (1961), 21 Ill. 2d 594, 174 N.E.2d 393), or in violation of grand jury secrecy. See *People* v. *Johnson* (1964), 31 Ill. 2d 602, 203 N.E.2d 399.

The defendant's third argument on appeal is that the trial court erred in denying the admission into evidence testimony concerning certain conversations he had with his father. It is the defendant's contention that the court's refusal to allow this offer of proof precluded him from countering the State's argument that the defendant and his father acted in concert in a scheme to embezzle the estate's assets. This contention is without merit.

The right to produce and examine witnesses is not violated where the testimony sought to be admitted is not material and relevant to any valid defense to the crime charged. (*People* v. *Gischer* (1977), 51 Ill. App. 3d 847, 366 N.E.2d 521.) The defense in the instant case consisted of the testimony of one witness, the defendant himself. At one point in his testimony the defendant stated that he did not want to participate in the decedent's estate but did so at the direction of his father. Through his testimony the defendant tried to establish his unfamiliarity with estate matters and to show that his father was basically in charge of the administration of the decedent's estate while the defendant was simply following his father's orders. At several points in his testimony, the defendant was about to testify about statements his father made, but objections were sustained. This testimony would not have been relevant to the defense of ignorance since the defendant's testimony had already established that he was aware that something was wrong with the administration of the estate.

At best, the excluded evidence could have shown that the defendant was a reluctant participant in the scheme to defraud the estate. This, however, is no defense. The defendant's supposed good intentions do not justify his knowing participation in a scheme to defraud the decedent's estate. Therefore, the exclusion of this evidence was not error.

The defendant's final argument is that the sentence he received was illegal because he was not advised of his option to elect under which sentencing statute he was to be sentenced. The defendant also claims that his sentence was excessive. We disagree.

This court recently held that the power to punish for contempt is not created or limited by any statutory provisions (*47th and State Currency Exchange, Inc.* v. *B.*

Coleman Corp. (1977), 56 Ill. App. 3d 229, 371 N.E.2d 294. The court stated:

> "The power of a court to punish for contempt does not depend on constitutional or legislative grant, but is inherent in all courts as essential to proper and effective functioning of the courts and to the administration of justice * * * Thus, the power of the courts of this State and the penalties to be imposed in a contempt proceeding are neither created or limited by act of the legislature." *47th and State Currency Exchange* at 233-34.

Hence, the determinate sentence of five years in the instant case was entirely proper and the defendant cannot complain that he was not advised of an option to elect since no option exists in contempt cases.

The defendant also complains that the sentence he received was excessive. Absent an abuse of discretion, the sentence imposed by the trial court should not be altered upon review since the trial court is normally in the best position to choose a suitable sentence. (*People* v. *Heflin* (1978), 71 Ill. 2d 525, 376 N.E.2d 1367; *People* v. *Perruquet* (1977), 68 Ill. 2d 149, 368 N.E.2d 882.) In the case at bar the trial court was presented with an attorney who embezzled funds from a very large estate, who filed false documents with the court and who had been disbarred. Considering these relevant factors and in light of the higher standard of conduct expected of those who as attorneys are in a position of trust and have direct involvement in the administration of justice, the sentence was proper, and the court did not abuse its discretion.

For the foregoing reasons the judgment of the trial court is affirmed.

Affirmed.

GOLDBERG, P.J. and O'CONNOR, Jr., J., concur.

APPENDIX II

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present Hon. Mayer Goldberg, Presiding Judge.

Present Hon. John M. O'Connor Jr., Judge.

Present Hon. Calvin C. Campbell, Judge.

Gilbert S. Marchman, Clerk Richard J. Elrod, Sheriff

No. 76-722

People of the State of Illinois,

Plaintiff-Appellee,

vs.

Melvin E. Levinson,

Defendant-Appellant.

Appeal from Circuit Court of Cook County.

Circuit Court No. 65P8275 & AC-C-76-21

IN THE
APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

NO. 76-722 — 65 P 8275 — AC-C-76-21

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MELVIN E. LEVINSON,

Defendant-Appellant.

ORDER

Upon consideration of the petition for rehearing filed by defendant-appellant on September 17, 1979, said petition is hereby denied.

/s/ *Mayer Goldberg*
Mayer Goldberg, Presiding Justice

/s/ *John M. O'Connor, Jr.*
John M. O'Connor, Justice

/s/ *Calvin C. Campbell*
Calvin C. Campbell, Justice

DATED: September 24, 1979.

I, Gilbert S. Marchman, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and

keeper of the records, files and seal thereof, Do HEREBY CERTIFY, That the foregoing is a true copy of a certain order entered in said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 9th day of June in the year of our Lord one thousand nine hundred and Eighty.

/s/ *Gilbert S. Marchman*
Clerk of the Appellate Court of the First District, Illinois

(Seal)

APPENDIX III

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) SS.
SUPREME COURT)

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the tenth day of March in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood

Justice Howard C. Ryan

Justice Thomas J. Moran

Justice Daniel P. Ward

Justice William G. Clark

Justice Thomas E. Kluczynski

William J. Scott, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 27th day of March 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 52914

People State of Illinois,

Respondent

vs.

Melvin E. Levinson,

Petitioner

Petition for Leave to Appeal from Appellate Court, First District — 76-722

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

IN THE

SUPREME COURT OF ILLINOIS

No. 52914

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

-vs-

MELVIN E. LEVINSON,

Petitioner.

ORDER

(Filed April 9, 1980)

Upon motion of counsel for the defendant, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the mandate herein is stayed pending the timely filing of a petition for a writ of certiorari and, in the event a writ of certiorari is timely filed, pending a decision by the United States Supreme Court.

ENTER: /s/ *Thomas E. Kluczynski*

JUSTICE

DATED: Apr 8th 1980

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) SS.
SUPREME COURT)

I, CLELL L. WOODS, Clerk of the Supreme Court of Illinois, and keeper of the records, files and Seal, thereof, do hereby certify the foregoing to be a true copy of an order entered by the Supreme Court on March 27, 1980, denying petition for leave to appeal and order staying mandate, in a certain cause entitled:

No. 52914

People State of Illinois,

Respondent

vs.

Melvin E. Levinson,

Petitioner

Petition for Leave to Appeal from Appellate Court, First District — 76-722

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filed in this office on the 10th day of January A.D. 1980.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 6th day of June 1980.

/s/ *Clell L. Woods*, Clerk,
Supreme Court of the State of Illinois.

(Seal)